

JAN 5 1988

JOSEPH F. SPANIOL, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL N. CARLIN, PETITIONER

v.

JOHN R. MCKEAN, INDIVIDUALLY AND AS A MEMBER
OF THE BOARD OF GOVERNORS OF THE
UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DOUGLAS N. LETTER
ROBERT D. KAMENSHINE
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*



QUESTION PRESENTED

Whether the federal courts have jurisdiction to review the removal of the Postmaster General by the Board of Governors of the United States Postal Service.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

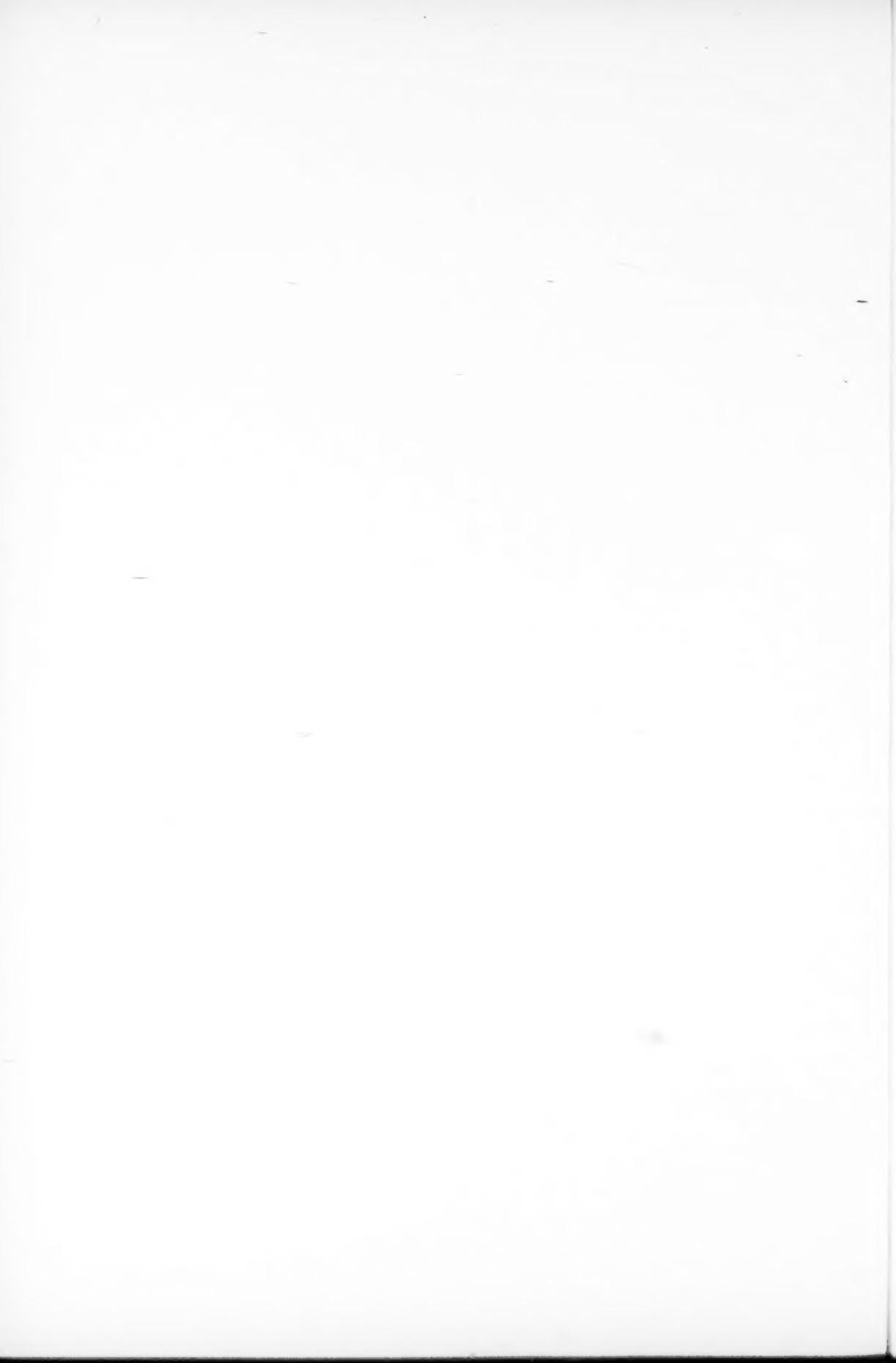
<i>Board of Governors v. Agnew</i> , 329 U.S. 441 (1947)	6
<i>Curran v. Laird</i> , 420 F.2d 122 (D.C. Cir. 1969)	7
<i>Doe v. Casey</i> , 796 F.2d 1508 (D.C. Cir. 1986), cert. granted, No. 86-1294 (June 8, 1987)	8
<i>Hennen, In re</i> , 38 U.S. (13 Pet.) 230 (1839)	4
<i>Local 2855, AFGE v. United States</i> , 602 F.2d 574 (3d Cir. 1979)	7
<i>United States v. Arredondo</i> , 31 U.S. (6 Pet.) 691 (1832) ..	6

Statutes:

National Security Act of 1947, § 102(c), 50 U.S.C. 403(c)	8
Postal Reorganization Act of 1970, 39 U.S.C. (& Supp. III) 101 <i>et seq.</i>	3
39 U.S.C. (& Supp. III) 202(a)	3
39 U.S.C. (& Supp. III) 202(b)	3
39 U.S.C. 202(c)	2, 3, 6, 7, 8, 9
39 U.S.C. 202(d)	9
39 U.S.C. 205(c)(1)	3, 4, 8
39 U.S.C. 205(c)(2)	9
39 U.S.C. 1001(b)	3
39 U.S.C. 1005(a)	3
39 U.S.C. 1005(a)(3)	3
5 U.S.C. 7513(a)	3

Miscellaneous:

<i>Oversight Hearing on United States Postal Service Board of Governors: Hearing Before the House Comm. on Post Office and Civil Service</i> , 99th Cong., 2d Sess. (1986)	5
--	---



In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-523

PAUL N. CARLIN, PETITIONER

v.

JOHN R. MCKEAN, INDIVIDUALLY AND AS A MEMBER
OF THE BOARD OF GOVERNORS OF THE
UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 823 F.2d 620. The memorandum opinion of the district court (Pet. App. 17a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on July 17, 1987, and a rehearing petition with a suggestion for rehearing en banc was denied on September 25, 1987 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on September 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board of Governors of the United States Postal Service appointed petitioner Postmaster General on

January 1, 1985, and removed him from that position on January 6, 1986. Seven of the eight active Governors attended the meeting at which the Board voted to dismiss petitioner; six Governors voted to dismiss and one abstained. Petitioner alleges that the Governors removed him from office because he was impeding a corrupt scheme by two of the Governors to channel the award of a Postal Service contract to a bidder in return for kickbacks. Those two Governors, one of whom subsequently pleaded guilty to three felony counts related to the kickback scheme and was sentenced to four years' imprisonment (Pet. App. 18a-19a, 21a, 82a-83a, 124a), allegedly conspired to bring about petitioner's dismissal in order to replace him with a more pliable Postmaster General.

Petitioner filed suit in the United States District Court for the District of Columbia requesting that he be reinstated as Postmaster General following the scheduled August 15, 1986, resignation of his successor, Albert V. Casey. In addition to the United States Postal Service, petitioner named each of the members of the Board of Governors, individually and in his or her official capacity, as a defendant. Petitioner claimed, *inter alia*, that the decision to remove him was flawed because it was based on false information and was part of the kickback scheme. Pet. App. 17a, 21a-22a. On July 18, 1986, the district court held that the controversy was not justiciable and granted defendants' motion to dismiss (*id.* at 17a-31a). The Board of Governors subsequently appointed Preston R. Tisch, who continues to serve as Postmaster General, to succeed Postmaster General Casey.

In holding that it lacked jurisdiction, the district court relied primarily on 39 U.S.C. 202(c), which provides in full: "The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors." The court concluded

that, “[i]n vesting the Governors with the power of appointment and removal of the Postmaster General, Congress thus placed *no* limitations on this power in the Postal Act other than the requirement that such a decision be reached by ‘a favorable vote of an absolute majority of the Governors in office.’” Pet. App. 24a-25a (emphasis in original) (quoting 39 U.S.C. 205(c)(1)). The court concluded that petitioner’s “challenges to the Governors’ decision must fail because there is no statutory or constitutional standard with which this court can evaluate their reasons for removing [petitioner] and * * * because we cannot compel the relief which he contends is due.” Pet. App. 23a.

The court of appeals affirmed (Pet. App. 1a-11a). The court first concluded that the language of Section 202(c) “unmistakably vests the Governors with complete authority over the Postmaster’s tenure and is ample indication that Congress intended to preclude judicial review of their decisions to appoint or remove any person in that post” (Pet. App. 6a). The court found further support (*ibid.*) for that reading of Section 202(c) by contrasting it with the language of other provisions of the Postal Reorganization Act of 1970, 39 U.S.C. (& Supp. III) 101 *et seq.* Under the Act, the governors, who are appointed by the President, serve nine-year terms and “may be removed only for cause.” 39 U.S.C. (& Supp. III) 202(a) and (b). Similarly, Postal Service employees may be removed only following a “fair hearing” (39 U.S.C. 1001(b)) and, under 39 U.S.C. 1005(a), are covered by the provision of the civil service laws that provides that federal employees may be removed “only for such cause as will promote the efficiency of the service” (5 U.S.C. 7513(a)). The Postmaster General, unlike the Governors, is not granted a fixed term and the statute does not provide that he may be removed only for cause. Further, the post is excepted from the provisions governing the discharge of employees (39 U.S.C. 1001(b),

1005(a)(3)), making it doubly clear that it is not necessary to establish cause for the removal of a Postmaster General.

The court of appeals also noted (Pet. App. 7a) that in *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839), the Court concluded that “when the law does not fix a tenure of office or require any cause for removal from that office, the office ‘must be held at the will and discretion of some department of the government, and subject to removal at pleasure.’” The court of appeals here concluded: “The President had complete authority to remove the Postmaster when that official was a Cabinet member. In reorganizing the Postal Service in 1970, and transferring this authority from the President to the Governors, Congress quite deliberately avoided any break with the historical understanding that the Postmaster serves only at the pleasure of his superiors.” Pet. App. 7a-8a.

The court then responded to petitioner’s argument that review is warranted because his discharge was caused by fraud and corruption. The court first concluded that the cases petitioner cited establishing an inherent authority of courts to deal with fraud were not relevant because they “all deal[t] with strictly financial matters” (Pet. App. 8a) and they all concerned a “power to revise a judgment that was obtained by * * * fraud” (*id.* at 9a). Moreover, the court concluded, any inherent common law authority to take jurisdiction to control fraud is plainly subject to Congress’s modification, and “[h]ere Congress’ intent to preclude review is sufficiently clear from the language, structure, and background of the statute that it does not lend itself to any such exception” (*id.* at 10a).

The court also rejected petitioner’s argument that review is warranted to determine whether the discharge was made in compliance with Section 205(c)(1)’s requirement that a majority of active governors must vote to discharge a Postmaster General. Because the votes of two of the

Governors were allegedly inspired by fraud, petitioner argued that their votes should not be counted; if their votes are discounted, then only four of the eight active Governors voted to discharge. The court noted that "there is no question that a majority of the Governors then in office voted to discharge" petitioner (Pet. App. 10a), and concluded that, because petitioner actually seeks to question their motivations rather than their numbers, his argument is "an attempt to clothe in procedural guise a determination that goes to the merits" (*id.* at 10a-11a). Since it had held that there is no basis for review of the merits of petitioner's dismissal, the court held that it lacked jurisdiction to consider petitioner's "procedural" argument.

ARGUMENT

The courts below correctly concluded that they lacked jurisdiction to review petitioner's removal or to order his reinstatement. The court of appeals' decision, which is firmly grounded in the language of the Postal Reorganization Act of 1970 and accordingly has little general applicability, does not conflict with any decision of this Court or another court of appeals. Accordingly, there is no warrant for review by this Court.

The events surrounding petitioner's removal constitute a regrettable episode in the history of the Postal Service that has been examined by Congress, the Postal Service, and federal prosecutors. Hearings were conducted by a Committee of the House of Representatives. *Oversight Hearing on United States Postal Service Board of Governors: Hearing Before the House Comm. on Post Office and Civil Service*, 99th Cong., 2d Sess. (1986). The Board of Governors initiated reforms in response to the scandal, including the adoption of a Code of Ethics for Governors (*id.* at 63). And, as noted, the former Governor at the heart of the scandal pleaded guilty to criminal charges and was sentenced to four years' imprisonment (Pet. App.

124a). It does not follow, however, that petitioner should be reinstated as Postmaster General. That decision is committed to the unreviewable discretion of the Governors of the Postal Service by Section 202(c), and they have not decided to reappoint him.

Petitioner does not dispute that courts generally lack jurisdiction to review the removal of a Postmaster General. It is plain that there is no basis for review in the Postal Reorganization Act. In that Act, Congress in 1970 transferred the power to appoint and remove the Postmaster General, formerly held by the President, to the Governors of the Postal Service. As the court of appeals concluded, under Section 202(c) “[n]o qualifications whatever are attached to their exercise of these powers.” Pet. App. 5a-6a. A comparison with other provisions of the Postal Reorganization Act demonstrates that the absence of any qualification is intentional, as the court of appeals also concluded (*id.* at 6a).

Petitioner contends (Pet. 10-17), nevertheless, that an exception based on *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832), should be read into the statute to authorize judicial review in any case where the removal allegedly was fraudulently induced. There is no basis for such an exception. As the court of appeals concluded, neither *Arredondo* nor any other decision of this Court cited by petitioner (Pet. 10) holds that a court has jurisdiction to consider whether the removal of a federal employee was induced by fraud.¹ While no prior case is directly on

¹ Indeed, of the eight decisions of this Court that petitioner cites in support of his fraud exception, only *Board of Governors v. Agnew*, 329 U.S. 441 (1947), involved the removal of a person from an office, and that person was not a federal employee. In *Agnew*, the Court concluded that an order of the Board of Governors of the Federal Reserve System removing directors of a national bank from office pursuant to the Banking Act of 1933 was reviewable. That case is plainly distinguishable from this one because the Banking Act provided for

point because none involved the removal of a Postmaster General pursuant to Section 202(c), the most relevant decision of this Court is *Hennen*, where the Court held that it lacked jurisdiction to review the removal of a federal “at will” employee. Moreover, since it is quite clear that “Congress intended affirmatively to preclude judicial review of the Governors’ decisions to appoint and remove the Postmaster General” (Pet. App. 5a), reading such an exception into the statute would be contrary to Congress’s intent.

Consideration of analogous cases confirms that no fraud exception should be read into Section 202(c). The President’s decision to remove a Cabinet member is plainly unreviewable, and it would seem clear that a discharged Cabinet member could not obtain judicial review either of a claim that his dismissal had been induced by fraud or of a demand that he be reinstated. Yet under petitioner’s logic (Pet. 11-12), it is a “universal principle” that judicial review is available to consider whether otherwise unreviewable action was fraudulently induced, and courts therefore would have jurisdiction in such a case. Moreover, under petitioner’s theory, they presumably would have the power to order the President to reinstate a person who showed that his removal from the Cabinet had been tainted by fraud, just as petitioner contends that courts have power to reinstate him as Postmaster General, even though Section 202(c) provides that the Governors of

removal only on account of continued violations of banking laws and required notice and a hearing (329 U.S. at 443). No such substantive or procedural standards are set forth in Section 202(c). Moreover, no claim of fraud was involved in *Agnew*. The decisions of the courts of appeals petitioner cites (Pet. 11-12) in support of his fraud exception do not support his argument either. Neither *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979), nor *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (en banc), involved the removal of a person from an office, and in each case the court concluded that the agency action at issue was unreviewable.

the Postal Service have the unqualified power to appoint and remove Postmasters General. It is clear that petitioner's argument for a fraud exception sweeps much too broadly.

Petitioner also contends (Pet. 17-22) that review is warranted to determine whether his removal violated statutory provisions other than Section 202(c). The court of appeals properly rejected petitioner's argument (Pet. 21-22) that review is warranted to determine whether, as Section 205(c)(1) requires, "an absolute majority of the Governors in office" voted to remove him. As it concluded, even on the assumption that such a claim is reviewable (Pet. App. 10a), it is uncontested in this case that a majority of the Governors in office voted to remove petitioner. His request that the court go further and inquire into their motivations in order to nullify certain votes is merely a restatement of his argument that review is warranted because his removal was fraudulently induced. Petitioner also contends (Pet. 18-19) that his removal was contrary to provisions of the United States Criminal Code. But while those statutes provide a basis for punishing any Governor shown to have violated them, they provide no basis for review of petitioner's removal.²

² Petitioner cites (Pet. 22) *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), cert. granted, No. 86-1294 (June 8, 1987), in support of his claim that review is always available to determine whether an agency action violated a statutory command. That case is plainly distinguishable, so there is no need to hold this petition for *Webster v. Doe, supra*. At issue there is whether a removal pursuant to Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), which provides that the Director of the Central Intelligence Agency may terminate an employee "whenever he shall deem such termination necessary or advisable in the interests of the United States," is reviewable by the courts. The court of appeals found that review was not precluded because the statute "provides a standard—the termination must be 'necessary or advisable in the interests of the United States'" (796 F.2d at 1516). While we disagree that the "standard" of

Finally, even if the court of appeals' decision were not plainly correct, it would not warrant review by this Court. That decision turned on the court of appeals' reading of Congress's intent embodied in Section 202(c) and related provisions of the Postal Reorganization Act. Accordingly, the holding of the court below is limited in application to removals of Postmasters General and Deputy Postmasters General.³ It seems unlikely that such removals will be contested with such regularity that this Court's attention is needed.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DOUGLAS N. LETTER
ROBERT D. KAMENSHINE
Attorneys

JANUARY 1988

Section 102(c) of the National Security Act provides a basis for judicial review, the relevant provision here, Section 202(c), provides no standard whatever for the removal of Postmasters General.

³ Under 39 U.S.C. 202(d), which closely tracks the language of Section 202(c), the Deputy Postmaster General is appointed and removable by the Governors and the Postmaster General. An absolute majority of the active Governors and the Postmaster General is required to appoint or remove the Deputy. 39 U.S.C. 205(c)(2).